Supreme Court, U.S.
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No. 92-1524

In The

Supreme Court of the United States

October Term, 1992

JAMES B. DAVIS,

Petitioner,

v.

THE FIRST NATIONAL BANK OF KILLEEN, TEXAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a party waives its right to challenge the sufficiency of the evidence by its technical noncompliance with Rule 50(b) of the Federal Rules of Civil Procedure if the purposes of the Rule have been satisfied.

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STATEMENT OF THE CASE

Petitioner James B. Davis brought this case against the First National Bank of Killeen, Texas ("the Bank") for alleged violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). The case was tried before a jury and the Honorable Walter S. Smith, Jr. of the United States District Court, Western District of Texas, Waco Division, on October 25 and 26, 1990. At the conclusion of Petitioner's case-in-chief, the Bank made two motions for directed verdict (App. 82).[1] The first motion challenged the timeliness of Petitioner's demotion claim and was granted by the district court (App. 84). The second motion challenged *both* Petitioner's failure to establish constructive discharge *and* his lack of evidence establishing that he was the victim of age discrimination (App. 85). At the conclusion of all the evidence, the jury returned a verdict in favor of Petitioner and concluded that the Bank had willfully violated the ADEA (Tr. 420).

After considering each party's post-judgment motions, the trial court granted in part the Bank's Motion for Judgment Notwithstanding the Verdict and overturned the jury's finding of willfulness (R. 453-456). On December 2, 1991, final judgment was entered in this case awarding Petitioner $75,000 in back pay, $131,800 in front pay (representing four years salary), prejudgment interest at the rate of 10% and attorney's fees equalling one-third of the judgment (App. 35).

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[1] "App." refers to the Appendix to Davis' Petition for Writ of Certiorari, "Tr." refers to the trial transcript and "R" designates the record on appeal.

The Bank timely appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. On November 9, 1992, the Fifth Circuit reversed the jury verdict in favor of Petitioner and rendered judgment in favor of the Bank (App. 1). Although the Fifth Circuit acknowledged that the Bank had not technically complied with Rule 50(b) of the Federal Rules of Civil Procedure, the court proceeded to review the sufficiency of Petitioner's evidence proving age discrimination. Specifically, the court acknowledged that Judge Smith denied "at this time" the Bank's motion for directed verdict concerning Petitioner's evidence of age discrimination (App. 10). The court also recognized that the Bank called only one short witness in its case-in-chief (App. 10). Petitioner was then recalled to briefly summarize his previous testimony in rebuttal, and only a few minutes elapsed between the Bank's motion for directed verdict and the close of the evidence (App. 10). As a result, the Fifth Circuit properly concluded that the purpose of Rule 50(b) had been satisfied at the trial of this matter, and therefore the Bank did not waive its right to challenge the sufficiency of Petitioner's evidence proving age discrimination (App. 10). Finding that the record contained a total "dearth" of evidence providing any nexus between Petitioner's age and his resignation, the Fifth Circuit reversed the jury's verdict in Petitioner's favor and rendered judgment for the Bank (App. 16).

As the Fifth Circuit correctly found, the Bank did not waive its right to challenge the sufficiency of Davis' evidence of age discrimination. Davis produced no evidence connecting his resignation with his age, the Fifth

Circuit's judgment is correct and the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

Pursuant to the rules of this Court, a petition for writ of certiorari should be granted in only the rarest of circumstances. Basically, Rule 10 of this Court's Rules provides that the decision of a federal appellate court will be reviewed when the decision either 1) conflicts with the decisions of other courts of appeals or with this Court on the same matter; or, 2) an appellate court has so far departed from the accepted and usual course of judicial proceedings that this Court's supervision is required.

In this case, the Fifth Circuit correctly found that the Bank did not waive its right to challenge the sufficiency of Davis' evidence by its technical noncompliance with Rule 50(b) of the Federal Rules of Civil Procedure. The Fifth Circuit also correctly determined that Davis produced "at most the proverbial scintilla" of evidence connecting his age with his resignation (App. 14). Because the Fifth Circuit's decision in this case follows well-established decisions of the other circuit courts, Davis' Petition for Writ of Certiorari should be denied.

A. There Is No Conflict In Circuit Court Decisions

Rule 50(b) of the Fed. R. Civ. Proc. requires that a motion for directed verdict be made at the close of all the evidence. Federal courts have interpreted this Rule to mean that a party who fails to renew a motion for

directed verdict at the close of all the evidence, absent special circumstances, waives its right to move for a judgment n.o.v. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984). As indicated by these same decisions, courts do not require strict application of the Rule, as long as the purposes of the Rule are served. Instead, the application of Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth." *Id.* at 217; *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021 (5th Cir. 1987).[2]

One of the primary purposes of Rule 50(b) is to provide the opposing party with notice of any claimed evidentiary defects so that he or she can attempt to cure those defects before the case is submitted to the jury. *Merwine v. Board of Trustees for State Institutions*, 754 F.2d 631 (5th Cir.), *cert. denied*, 474 U.S. 823 (1985); *Ohio-Sealy Mattress Mfg. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). In determining whether the purposes of the Rule have been served, circuit courts review the evidence and course of proceedings in the trial court to determine whether the party opposing the motion for judgment n.o.v. was prejudiced by the failure of the moving party to request a directed verdict at the close of the evidence. *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984); *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2nd Cir. 1987).

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[2] No circuit court disagrees with this proposition.

For example, in *McKinnon*, the court held that a defendant's failure to move for directed verdict at the close of the evidence after having moved for directed verdict at the close of the plaintiff's case did not bar its motion for judgment n.o.v. because the plaintiff suffered no prejudice. In reaching this conclusion, the court stated,

> If none of the evidence put in as part of the defendant's case weakens the defendant's motion for directed verdict, the plaintiff cannot argue that he thought that the defendant, by not renewing the motion, had abandoned it because its evidentiary foundations had been weakened, and thinking this had therefore not put in rebuttal evidence that might have repaired the evidentiary deficiencies exposed by the initial motion.

McKinnon, supra, 750 F.2d at 1390. The inherent logic of this approach was succinctly reiterated by the Second Circuit:

> The point is that a party opposing a motion for judgment n.o.v. suffers no prejudice from its adversary's failure to renew a motion for directed verdict at the close of the evidence where the party could *not* reasonably have thought, based on its adversary's defense case, that the adversary no longer thought there was an insufficiency of evidence. Such a thought could *not* be reasonably entertained where the adversary's evidence, . . . , only strengthened its own case and did nothing to strengthen the case of the party opposing the motion for judgment n.o.v. [emphasis in original].

Best Brands Beverage, supra, 842 F.2d at 598 n.3.

Rather than the exception, it is the rule that a party's failure to renew a motion for directed verdict at the close of all the evidence will not foreclose a challenge to the sufficiency of the evidence "if the evidence introduced after the motion for directed verdict was brief, and the court somehow indicated that renewal of the motion would not be necessary." *Riverview Investments v. Ottaway Community Imp.*, 899 F.2d 474, 477 (6th Cir.), *cert. denied*, 111 S.Ct. 151 (1990); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Ohio-Sealy, supra*, 585 F.2d at 825-26; *Best Brands, supra*, 842 F.2d at 587. As demonstrated by these decisions, a contrary rule would amount to "slavish application" of Rule 50(b) and would require federal courts "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." *Id.*; *Riverview, supra*, 899 F.2d at 477; *see also Bohrer, supra*, at 216; *McKinnon, supra*, at 1390; *Halsell, supra*.

As in the above cases where noncompliance with Rule 50(b) was excused, the purposes of the rule were very clearly satisfied in the present case. Petitioner cannot argue that he suffered any prejudice as a result of the Bank's failure to move for directed verdict at the close of the evidence.[3] After the close of Petitioner's case-in-chief, the Bank called only one witness to briefly testify. That witness, Churchill Jones, weakened Petitioner's case in a number of material and significant ways, including testimony concerning the types of deficiencies in Petitioner's

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[3] Petitioner's contention that the Bank's motion for directed verdict did not address age discrimination is meritless. *See* App. 85.

work performance and testimony as to the hiring practices of the new management (which reflected no age bias). Petitioner attempted to cure the obvious defects in his proof by recalling Davis to briefly reiterate his conclusory assertions that he was constructively discharged and discriminated against on the basis of age. Petitioner offered no new evidence in his rebuttal testimony to substantiate these claims, and his testimony was merely cumulative.

In addition, the Fifth Circuit recognized in this case that the trial judge denied the Bank's motion for directed verdict "at this time" (App. 10). Based upon the judge's pronouncement, the Bank could reasonably assume that the judge was continuing to consider the motion. Requiring the Bank to articulate the words of a directed verdict at the close of the evidence would surely elevate form over substance and would defeat, rather than promote, the purposes behind Rule 50(b).

As in *Best Brands*, there was "no possibility that [the Bank] misled [Davis] into holding back any rebuttal evidence." *Best Brands, supra*, 842 F.2d at 587. As in *McKinnon*, Petitioner's case was not strengthened by any evidence presented during the Bank's case-in-chief. Instead, this "de minimis lapse equates with the one [the Fifth Circuit] forgave" in previous decisions of that court (App. 10). *See Merwine v. Board of Trustees*, 754 F.2d 631, 635 (5th Cir.), *cert. denied*, 474 U.S. 823 (1985). The primary purpose of Rule 50(b) was accomplished when Davis was put on notice of the claimed deficiencies in his proof by the Bank's earlier motion for directed verdict. Given the Fifth Circuit's recognition of the total "dearth" of evidence establishing age discrimination (App. 16),

Petitioner cannot credibly assert that he was lulled into believing the Bank had abandoned its position that there was insufficient evidence to justify sending the case to the jury, or that he was "surprised" when the Bank raised these issues in post-trial and post-judgment motions. It is thus clear that the Bank did not waive its challenge to the sufficiency of Petitioner's evidence and the Fifth Circuit properly found that his evidence was insufficient to support the jury's verdict.

B. There Was No Departure From The Usual Course Of Proceedings

While Petitioner suggests that there was a "departure from the usual course of proceedings" by the Fifth Circuit, necessitating this Court's discretionary review, this contention is without merit. As noted above, the circuit courts dealing with this issue have consistently found that technical compliance with Rule 50(b) is unnecessary if the purpose of the rule is satisfied. However, as the Fifth Circuit recently made clear, courts do not hesitate to stringently apply Rule 50(b) where the purposes of the rule have *not* been satisfied.

In *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir. 1993), the court acknowledged that it has been "willing to excuse certain 'de minimis' departures from technical compliance with Rule 50(b)" in the past. The court went on to note, however, that

> [i]n each case, the trial court had reserved a ruling on an earlier motion for directed verdict (made at the close of the plaintiff's evidence);

> the defendant called no more than two witnesses before closing; only a few minutes elapsed between the motion for directed verdict and the conclusion of all the evidence; and the plaintiff introduced no rebuttal evidence.

Id. In contrast, the district court in *McCann* flatly denied the motion for directed verdict and the movant introduced numerous witnesses after close of the plaintiff's case, amounting to a full day of testimony. Although the Fifth Circuit, and its sister circuits, have approached questions of technical compliance with a "liberal spirit," the Fifth Circuit has not and has refused to "rewrite the Federal Rules of Civil Procedure." *Id.* at 673. Rather than departing from the normal course of proceedings, the Fifth Circuit in this case fully and properly determined that the purposes of Rule 50(b) had been satisfied, "scoured the record" (App. 14), and reviewed the sufficiency of Petitioner's evidence. Finding "at most the proverbial scintilla," the Court then properly entered judgment for the Bank (App. 14).

CONCLUSION

Although it is axiomatic that this Court does not sit to decide factual issues and reweigh the evidence presented at trial below,[4] Petitioner seeks exactly that remedy. There is no critical question of unique importance

[4] *See e.g. Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

requiring this Court's attention. The circuit court decisions on this issue are in harmony, not conflict. Nor has there been any "departure" from the usual course of proceedings. Consequently, the Petition for Writ of Certiorari to the Fifth Circuit in this case should be denied.

Respectfully submitted

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